93-808

No.

Supreme Court, U.S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1993

JERALD FELDMAN, ET AL.,
Petitioners,

v.

RESOLUTION TRUST CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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November 18, 1993

BATEMAN & SLADE, INC BOSTON, MASSACHUSETTS

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IN THE SUPREME COURT OF

THE UNITED STATES

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PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR

THE FIRST CIRCUIT

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November 18, 1993

QUESTION PRESENTED

Whether it is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision when a United States Court of Appeals, after finding that the D'Oench Duhme doctrine is inapplicable to the case, affirms summary judgment entered by a district court against defendants on the sole ground that the D'Oench Duhme doctrine barred the district court's consideration of all defenses.

LIST OF PARTIES

Petitioners

1. DANIEL M. DRISCOLL, JR., Individually and as He Is Trustee of the Quinaquisset Realty Trust,
2. FREDERIC S. CLAYTON,
3. HARVEY FLEISHMAN,
4. PAUL W. GOODRICH,
5. HENRY G. KARA,
6. ROBERT MARGIL,
7. STEVEN WATCHMAKER,
8. NEIL ZAIS,
9. JERALD FELDMAN, and
10. GERALD FINEBERG.

Respondent

RESOLUTION TRUST CORPORATION.

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RESOLUTION TRUST CORPORATION,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the First Circuit Court of Appeals entered in the above-entitled proceeding on August 20, 1993.

REPORTS OF OPINIONS

The opinion of the First Circuit

Court of Appeals for which review is sought is reported as Resolution Trust Corp. v. Feldman, 3 F.3d 5 (1st Cir. 1993), and is reprinted in the appendix hereto. Partial summary judgment had been issued previously and separately appealed to the First Circuit Court of Appeals, which affirmed the district court's dismissal of the petitioner's claims against a third party, reported as Resolution Trust Corp. v. Driscoll, 985 F.2d 44 (1st Cir. 1993). The opinions of the United States District Court for the District of Massachusetts are unreported.

JURISDICTION

The respondent removed this suit from state court to the federal district court for the District of Massachusetts on November 14, 1990, pursuant to 12

U.S.C., § 1441(a)(1)(3)(A). On November 13, 1992, the district court entered summary judgment for the respondent. On petitioners' appeals, the First Circuit entered a judgment and opinion affirming the district court on August 20, 1993. No rehearing or extension of time to file this petition has been sought. The jurisdiction of this Court to review the judgment of the First Circuit is invoked under 28 U.S.C., § 1254(1).

STATUTES INVOLVED IN THE CASE

1. 12 U.S.C., § 1823(e) **Agreements against interests of the Corporation.**

No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the

Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

2. G.L. c. 106, § 3-606(1)(a) **Impairment of Recourse or of Collateral.**

(1) The holder discharges any party to the instrument to the extent that without such party's consent the holder

(a) without express reservation of

rights releases or agrees not to sue any person against whom the party has to the knowledge of the holder a right of recourse or agrees to suspend the right to enforce against such person the instrument or collateral or otherwise discharges such person, except that failure or delay in effecting any required presentment, protest or notice of dishonor with respect to any such person does not discharge any party as to whom presentment, protest or notice of dishonor is effective or unnecessary

. . . .

STATEMENT OF THE CASE

This lawsuit originated in business dealings between two realty trusts. The two trusts, Fox Run Realty Trust ("Fox Run") and Quinaquisset Realty Trust ("Quinaquisset"), owned adjacent tracts

of land in Mashpee, Massachusetts. In December of 1986 Quinaquisset and Fox Run entered into an agreement to merge their adjacent parcels and to develop the combined tract (the "Development Agreement"). The Development Agreement called for Quinaquisset to convey approximately 152 acres (the "152 Acres") of prime waterfront real estate to Fox Run. In exchange for this conveyance from Quinaquisset to Fox Run, Fox Run agreed to develop the combined property into a residential community and golf course to be known as Willowbend and to convey back to Quinaquisset twenty single family house lots (the "House Lots") and rights to build twenty-three condominium units (the "Condominium Rights"). The Development Agreement also granted an

option to Fox Run to repurchase the rights to build twenty-two condominium units at an agreed price of $1,650,000. To assure Fox Run's performance under the Development Agreement, Fox Run granted to Quinaquisset on December 31, 1986, a first mortgage on the 152 Acres (the "Performance Mortgage"). In September of 1987, Sentry Federal Savings Bank ("Old Sentry") agreed to lend Fox Run $13,140,000 to finance the Willowbend development.

In October of 1987, Fox Run conveyed the House Lots and Condominium Rights to Quinaquisset pursuant to the Development Agreement. Contemporaneously with the October 1987 conveyance, Fox Run exercised its option under the Development Agreement and repurchased the Condominium Rights. The $1.65

million purchase price for the Condominium Rights consisted of $550,000 in cash and a promissory note from Fox Run to Quinaquisset in the principal amount of $1.1 million (the "Fox Run Note"). Quinaquisset discharged the Performance Mortgage at this time. Old Sentry lent Fox Run the $550,000 in cash to enable Fox Run to acquire the Condominium Rights. Pursuant to its obligation to fund the Willowbend development, Old Sentry issued a series of memoranda reiterating its promise to fund the payments necessary to retire the Fox Run Note.

Quinaquisset then borrowed $950,000 from Old Sentry by a promissory note (the "Quinaquisset Note"). In conjunction with the Quinaquisset Note, Quinaquisset pledged the Fox Run Note as

collateral and gave limited personal guarantees of the individual petitioners (the "Guarantors"). The Fox Run Note was delivered to Old Sentry and held by Old Sentry as collateral for the $950,000 loan to Quinaquisset. As Fox Run made payments on the Fox Run Note, drawn on Old Sentry, Quinaquisset used the income from the payments on the Fox Run Note to retire the Quinaquisset Note. In August of 1989, Old Sentry stopped permitting Fox Run to draw funds to pay the Fox Run Note. Fox Run stopped making payments on the Fox Run Note (which payments had been retiring the Quinaquisset Note). Quinaquisset remained current on the Quinaquisset note until November of 1989.

On April 25, 1990, Old Sentry, without the knowledge or acquiescence of

Daniel M. Driscoll, Jr., as trustee (the "Trustee") or the Guarantors, entered into a Settlement and Release Agreement (the "Fox Run Release") with Fox Run and Fox Run's trustees. Under the Fox Run Release, Fox Run agreed to convey all its property, including the Condominium Rights it had purchased from Quinaquisset, to Old Sentry's wholly owned subsidiary, Evergreen, in exchange for Old Sentry's promise not to seek recourse against Fox Run's trustees on the Fox Run Note, which Old Sentry was holding as collateral for the loan to Quinaquisset of $950,000.

Old Sentry defaulted Quinaquisset on the Quinaquisset Note in May of 1990. When Quinaquisset sought to pursue its rights on the Fox Run Note, Old Sentry threatened Quinaquisset with legal

action on May 25, 1990. Although Old Sentry was bound by the Fox Run Release and therefore could not collect from Fox Run on the Fox Run Note, Old Sentry would not return the Fox Run Note so that Quinaquisset could collect on it. The effect of these actions was that Old Sentry put Quinaquisset in the position of having no ability to collect on the Fox Run Note and no means to pay the Quinaquisset Note. As a result, Old Sentry took the entire trust res of Fox Run and agreed not to sue the Fox Run beneficiaries (which group included both of Fox Run's trustees) on the Fox Run Note it held as collateral for the Quinaquisset Note.

On May 30, 1990, Old Sentry brought suit against all the petitioners except Jerald Feldman and Gerald Fineberg in

Middlesex Superior Court (Civil Action No. 90-3679). Old Sentry then sued Jerald Feldman and Gerald Fineberg in the Superior Court (Civil Action No. 90-4952). Old Sentry sought damages for default on the Quinaquisset note guaranteed by the Guarantors.

Old Sentry conducted a foreclosure sale on July 9, 1990 (hereinafter the "Foreclosure Sale"), by which Evergreen (Old Sentry's wholly owned subsidiary) sold the property Evergreen had taken from Fox Run's trustees, including the Condominium Rights, to itself.

On or about September 21, 1990, the Resolution Trust Corporation ("RTC") was appointed receiver of Old Sentry. A newly chartered federal savings association, Sentry Savings Bank, F.S.B. (hereinafter "New Sentry"), became the

successor to Old Sentry by accepting the transfer of certain liabilities and assets of Old Sentry pursuant to a Purchase Assumption Agreement with RTC. On September 21, 1990, the Director of the Office of Thrift Supervision took possession of New Sentry and appointed RTC as conservator. On November 14, 1990, RTC, as receiver for Old Sentry and as conservator for New Sentry, removed the two state cases to the district court for the district of Massachusetts (the "District Court"), substituting itself as plaintiff, by invoking the Financial Institutions Remove, Recovery, and Enforcement Act of 1989, 12 U.S.C., § 1441(a)(1)(3)(A).

Because Old Sentry had deprived Quinaquisset of both the income from the Fox Run Note and the Fox Run Note

itself, the Trustee and Guarantors sought by way of counterclaim and third-party complaint rescission of the sale of the Condominium Rights to Fox Run, a declaration that Evergreen had assumed Fox Run's debts, a constructive trust of the Condominium Rights with Evergreen as trustee for Quinaquisset as beneficiary, and a declaration that the Quinaquisset Note was void. The third-party complaint named Evergreen as third-party defendant.

The District Court entered summary judgment against the petitioners on the third-party claim. This was appealed to the First Circuit Court of Appeals (Docket No. 92-1805), which affirmed the District Court's dismissal of the petitioners' claims against the third-party defendant. Resolution Trust Corp.

v. Driscoll, 985 F.2d 44 (1st Cir. 1993). Petitioners have not sought review of this decision.

The District Court entered summary judgment against the petitioners on the original claim of RTC on November 13, 1992. In its Memorandum and Order, the District Court granted summary judgment to RTC on its underlying action, characterizing the petitioners' defenses as personal and foreclosed from consideration by federal common law interpretation of the D'Oench Duhme doctrine.

The First Circuit (Docket No. 93-1142) affirmed the District Court's entry of summary judgment on August 20, 1993. Resolution Trust Corp. v. Feldman, 3 F.3d 5 (1st Cir. 1993). In its opinion, the First Circuit

acknowledged that the D'Oench Duhme doctrine was probably inapplicable but affirmed the District Court on the basis that the petitioners had raised no defense against RTC, a ground not relied upon by the District Court.

Because the District Court entered summary judgment without considering any of petitioners' defenses and because the First Circuit affirmed summary judgment on the ground that the petitioners had raised no defenses, the result is that the petitioners lost the claim against them without ever having an opportunity to raise a defense.

REASONS FOR GRANTING THE WRIT

I.

The First Circuit, by affirming summary judgment on the sole ground that the petitioners' have raised no defenses

when the district court disposed of the case on summary judgment by precluding all defenses under the D'Oench Duhme doctrine, denied the petitioners an opportunity to be heard.

The First Circuit has created a new rule of law, the Anrig rule, by which it may dispose of a case before it on summary judgment on grounds not relied upon in the district court and which the losing party, having no reason to anticipate them, could never brief, argue, or rebut in any forum. The result is that the losing party is denied notice and an opportunity to be heard before his case is lost.

In the case at bar, the First Circuit acknowledged that there were many defenses and claims raised by petitioners in the district court but

that the district court had found all of petitioners' defenses and all but one of petitioners' counter-claims barred by the D'Oench Duhme doctrine. See pp. 43-44, infra. Petitioners briefed and argued that the D'Oench Duhme doctrine did not apply to the case at bar, and neither the district court nor the respondent at any time took the position that petitioners lacked meritorious counterclaims and defenses in the absence of the bar of D'Oench Duhme.

Before the First Circuit, the petitioners offered one defense and basis for their counterclaims as illustrative of the viable arguments to be presented to a trier of fact if the case should be remanded to the district court. The defense and basis for counterclaims presented to the First

Circuit rested on Massachusetts Commercial Code, § 3-606 (G.L. c. 106, § 3-606). In its opinion, the First Circuit rejected the Commercial Code argument and announced:

> Since Quinaquisset has failed to set forth a cause of action or defense against Sentry under section 3-606 (and thus, against the RTC as receiver), we sustain the district court on that ground. See Doe v. Anrig, 728 F.2d 30, 32 (1st Cir. 1984) (court may affirm on a ground not relied on by the district court).

See p. 54, infra. The First Circuit erred in its decision with respect to the Commercial Code argument, as discussed in section III, infra. But even if the petitioners failed to convince the First Circuit of the merits of their Commercial Code challenge to RTC, the issue before the First Circuit was whether D'Oench Duhme doctrine could

foreclose all petitioners' defenses and claims, not whether any one particular defense or claim failed.

More importantly, the First Circuit's interpretation of the Anrig rule is in direct conflict with two rulings of this Court in Helvering v. Gowran, 302 U.S. 238 (1937), and Securities Comm'n v. Chenery Corp., 318 U.S. 80 (1942). In Helvering, the Court addressed the petitioner's contention that a new theory should not have been permitted to be raised by the respondent on appeal. The Court stated that it is settled that if the decision below is correct, it must be affirmed although the lower court relied upon a wrong ground or gave a wrong reason. Helvering, supra, 302 U.S. at 238. But the Court went on to find that:

> If the Court of Appeals had accepted the theory, it would have been open to the [petitioner] to urge, in view of the new issue presented, that he should have the opportunity to establish before the Board additional facts which would affect the result. As we accept the new theory, leave is granted Gowran to apply to the lower court for that purpose.

Id. at 247.

In Chenery, the Court also remanded the case for further proceedings:

> [W]e do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct "although the lower court relied upon a wrong ground or gave a wrong reason." [citing Helvering] . . . But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury.

Chenery, supra, 318 U.S. at 88.

The Anrig rule completely omits this Court's caveats that the petitioner should have an opportunity to rebut the ground relied upon by the appellate court when no opportunity has previously been given and that the appellate court should not usurp the fact-finding role of the district court.

In Anrig itself, the First Circuit recognized that it was only:

> free to affirm a district court's decision "on any ground supported by the record even if the issue was not pleaded, tried, or otherwise referred to in the proceedings below." . . . The district court's judgment is adequately supported . . . . Therefore, that judgment is Affirmed.

Anrig, supra, 728 F.2d at 32 (citations omitted). In the case at bar, the record indicates clearly that the defenses and counterclaims of the petitioners were never permitted by the

District Court to be placed before it.

As the First Circuit interprets the Anrig rule, it is in conflict with other circuits. In Brown v. St. Louis Police Dep't, 691 F.2d 393 (8th Cir. 1982), cert. denied, 461 U.S. 908 (1983), the Eighth Circuit affirmed a motion to dismiss on grounds not addressed by the district court. Id. at 396. However, the Eighth Circuit acknowledged that it could only do so because:

> Brown has been fully aware that it is an issue in this case. The defendant raised the issue in its motion to dismiss and presses it in its brief on appeal.

Id. In the case at bar, petitioners had no such awareness.

In Seattle Times Co. v. Seattle Mailer's Union, 664 F.2d 1366 (9th Cir. 1982), the Ninth Circuit affirmed the district court's decision on grounds not

relied upon by the district court, but only because it found ample evidence in the record to support its finding. Id. at 1369. In the case at bar, the district court refused to hear evidence on any of petitioners' claims or defenses.

Other circuits require that the appellant be on fair notice of the grounds of affirmation before refusing to remand the case so that the appellant has an opportunity to respond. In 1990, the Ninth Circuit held that it could not affirm on grounds other than those considered by the district court when the case involved issues that had not been adequately briefed on appeal. McAlden v. Cal. Library Ass'n, 955 F.2d 1214, 1224 (9th Cir. 1990).

The First Circuit has thus created

a confusing precedent, likely to create even further confusion among the other Circuits. It is a precedent directly at odds with this Court's rulings in Helvering and Chenery. By employing the Anrig rule, the First Circuit may prevent parties appearing before it from having a meaningful hearing on issues which the First Circuit finds sua sponte. Plenary consideration of the matter by this Court is essential.

II.

Giving the D'Oench Duhme doctrine (12 U.S.C., § 1823(e)) so broad a reading as to foreclose all the petitioners' defenses conflicts with decisions of this Court and of other Circuits.

In 1942, this Court held that a "secret agreement", i.e., an agreement

that is not expressly reflected on the face of a loan document, cannot be enforced against agencies like RTC. D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942). The doctrine has been codified at 12 U.S.C., § 1823(e). For the D'Oench Duhme doctrine to foreclose all petitioners' defenses, the defenses must be based on an "agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it . . . ." 12 U.S.C., § 1823(e). A D'Oench Duhme "secret side agreement" has been thoroughly described in the case law:

> The essence of the D'Oench, Duhme doctrine is that a borrower may not assert a claim or defense against the FDIC which is based upon a secret side agreement he had with the bank because he has lent himself to a scheme, no matter how innocently, which would deceive the banking

authorities.

Aero Support Sys., Inc. v. FDIC, 726 F. Supp. 651, 653-654 (N.D. Tex. 1989). Secret side agreements may be oral and still satisfy the D'Oench Duhme doctrine. However, whether the secret side agreement is oral or in writing,

> The test for the application of the D'Oench, Duhme doctrine is whether the borrower "lent himself to a scheme or arrangement" whereby banking authorities are likely to be misled. D'Oench, Duhme, 315 U.S. at 460 . . . .

Beighley v. FDIC, 868 F.2d 776, 784 (5th Cir. 1989).

The defenses of the petitioners did not depend on any side agreement between the borrower, Quinaquisset, and the bank, Old Sentry. The Quinaquisset Note is the only agreement between the borrower and the bank. It is the document upon which the RTC bases its

claim against the Trustee and the Guarantors.

It is well settled that the D'Oench Duhme doctrine cannot be raised as a shield by the federal government when the alleged secret side agreement is the document which the federal government seeks to assert as the basis for its claim. Other agreements giving rise to claims and defenses in the case at bar are simply not agreements between the borrower and the bank. Rescission of the conveyance of the Condominium Rights to Fox Run sought in Counts I and II is based on the Fox Run Note, the agreement between Quinaquisset and Fox Run to exchange the Condominium Rights for the Fox Run Note, and the Fox Run Release. The first two agreements do not involve the bank; the third does not involve the

borrower. Although the Fox Run Release is a secret agreement, it is between Sentry Bank and Fox Run, and its illegal purpose is to induce Fox Run to breach the contractual terms of the Fox Run Note with respect to Quinaquisset and to empty the Fox Run Realty Trust of assets upon which Quinaquisset has a claim. Nothing in these transactions involve any agreement between Quinaquisset and Old Sentry, either written or oral.

The federal government has no greater protection than any other defendant to a claim for rescission in the absence of a secret side agreement.

> D'Oench was decided on the very narrow ground that an accommodation maker who executes a secret side agreement may not take "advantage of an undisclosed and fraudulent arrangement which [public policy] condemns and which the maker of the note made possible. Id. [315

> U.S. 447] at 461, 62 S.Ct. at 681 (emphasis supplied). Although this estoppel doctrine may apply even though the maker did not intend to deceive creditors or depositors, there at least must be a showing that "the maker lent himself to a scheme or arrangement whereby the banking authority . . . was or was likely to be misled." Id. at 460, 62 S.Ct. at 681.

FDIC v. Meo, 505 F.2d 790, 792 (9th Cir. 1974).

As the Eleventh Circuit has observed:

> There may be instances in which the borrowers are wholly innocent of any misconduct and, additionally, cannot be said to have lent themselves to arrangements that might deceive the banking authorities.

FDIC v. McCullough, 911 F.2d 593, 600 n.6 (11th Cir. 1990). The case at bar presents such an instance. In such an instance the equitable estoppel doctrine of D'Oench Duhme should not apply:

> Where ordinary and good-faith transactions are involved, [the FDIC succeeds] only to the rights which the bank itself acquired.

D'Oench, 315 U.S. at 474 (Jackson, J., concurring). The conflict among the Circuits as to the breadth of the sweep of the D'Oench Duhme doctrine is evident in the vigorous dispute over this point in the briefs below.

III.

The First Circuit erroneously decided that Massachusetts Commercial Code section 3-606 is not a defense to the respondent's claims against the petitioner.

The erroneous decision of the First Circuit in rejecting the petitioners' defense based on the Massachusetts Commercial Code is not argued here as a reason to grant certiorari. However,

the fact that the First Circuit erred underscores the importance of remanding this case to the District Court for a decision on the merits. The failure of this one defense was the only ground given by the First Circuit for affirming the entry of summary judgment below. See p. 53, infra.

The Massachusetts Commercial Code is codified in General Laws chapter 106. G.L. c. 106, § 3-606(1)(a), provides in pertinent part:

> (1) The holder discharges any party to the instrument to the extent that without such party's consent the holder
> (a) without express reservation of rights releases or agrees not to sue any person against whom the party has to the knowledge of the holder a right of recourse or agrees to suspend the right to enforce against such person the instrument or collateral or otherwise discharges such person . . . .

In the case at bar, the Trustee of Quinaquisset Realty Trust was a party to the Quinaquisset Note, i.e., the maker. The Guarantors were also parties to the Quinaquisset Note. Old Sentry was the payee on the Quinaquisset Note. Old Sentry was also the holder of the Fox Run Note as collateral for the Quinaquisset Note. Old Sentry had knowledge that the Trustee of Quinaquisset and the Guarantors had rights of recourse against Fox Run on the Fox Run Note running from Fox Run to Quinaquisset.

Under the terms of the Fox Run Release, the holder of the Quinaquisset Note, Old Sentry, discharged the payor, Quinaquisset, because without the payor's consent Old Sentry agreed not to sue Fox Run, a person to whom Old Sentry

knew Quinaquisset had a right of recourse, on the note running from Fox Run to Quinaquisset which Old Sentry held as collateral for the Quinaquisset Note. By the plain language of G.L. c. 106, § 3-606(1)(a), Old Sentry released the Trustee and the Guarantors of any obligation under the Quinaquisset Note, when it executed and induced Fox Run to execute the Fox Run Release.

Following Old Sentry's act, the D'Oench Duhme doctrine could no longer be considered in the case. It is a well established principle of federal common law that when the debt which forms the basis of the asset claimed by RTC is satisfied before RTC acquires the bank's assets, the D'Oench Duhme doctrine does not apply. Accordingly, RTC would take the note subject to all claims and

defenses held by its predecessor in interest, Old Sentry.

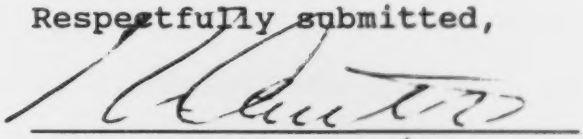
If RTC cannot avail itself of the D'Oench Duhme doctrine on its underlying claim against the petitioners, then it was error to affirm summary judgment to RTC without a trial on the genuine issues of material fact surrounding the claims and defenses of the petitioners under the Massachusetts Commercial Code and on the petitioners' other claims and defenses as well.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. To the extent petitioners have here argued the merits of their defenses to the original action, these arguments are not presented as a reason for granting certiorari. In the posture of

this case, this is the only opportunity for petitioners to seek review of the ultimate ruling of the First Circuit that petitioners' defenses and claims should not be heard. If petitioners are correct that the First Circuit had no jurisdiction to resolve the underlying case on the merits, the matter should be remanded to the District Court for appropriate disposition, after a full development of the facts.

Respectfully submitted,



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November 18, 1993

APPENDIX

I.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 93-1142

RESOLUTION TRUST CORPORATION,

Plaintiff, Appellee,

v.

JERALD R. FELDMAN, ET AL.,

Defendants, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Wm. G. Young, U.S. Dist. Judge]

Before Breyer, Chief Judge,

Bownes, Senior Circuit Judge,

and Boudin, Circuit Judge.

J. Daniel Lindley with whom Peter Antell and Antell & Associates were on brief for appellants.

James H. Wexler with whom Bennett H. Klein and Kotin, Crabtree & Strong

were on brief for appellee.

August 20, 1993

BOUDIN, Circuit Judge. In this appeal we revisit a suit brought by the Resolution Trust Company ("RTC"), as receiver for a failed bank, to collect on a promissory note given the bank by Quinaquisset Realty Trust ("Quinaquisset"). In the first round we affirmed the district court's dismissal of Quinaquisset's claims against a third party. Resolution Trust Corp. v. Driscoll, 985 F.2d 44 (1st Cir. 1993). We now affirm the district court's entry of summary judgment for the RTC in its action against Quinaquisset and its rejection of Quinaquisset's counterclaims against the RTC as receiver.

In October 1987, Fox Run Realty

Trust ("Fox Run") conveyed to Quinaquisset certain condominium rights in a property called Willowbend that Fox Run was then developing. Quinaquisset was given these rights because it had contributed land to the development. In a contemporaneous transaction, Fox Run then repurchased the condominium rights, giving Quinaquisset a $1.1 million promissory note as part payment with the balance paid in cash. Then, in April 1989, Quinaquisset borrowed $950,000 from Sentry Federal Savings Bank ("Sentry"), giving it in exchange a $950,000 promissory note which is the subject of this case. A number of individuals signed a guaranty of this new note, and Quinaquisset gave Sentry the $1.1 million Fox Run-Quinaquisset note as collateral for the new note.

Fox Run was also indebted to Sentry, having obtained in December 1986 a $13 million loan from Sentry to finance Willowbend. In return for this loan, Sentry took back a promissory note secured by a mortgage on Willowbend. Sentry's mortgage was initially subordinated as to 152 acres of Willowbend on which Quinaquisset then held a first mortgage, but Quinaquisset released its mortgage in October 1987 when it received the condominium permit rights subsequently repurchased by Fox Run. No one has ever explained why Quinaquisset exchanged its secured position in exchange for an unsecured claim of $1.1 million against Fox Run, but the consequences were evident when Fox Run encountered financial difficulties.

In August 1989, Fox Run fell into default on its payments to Quinaquisset. The next month, Fox Run halted payments on its $13 million debt to Sentry. Quinaquisset had been using the payments received from Fox Run on the $1.1 million note to cover Quinaquisset's payments to Sentry on the $950,000 note. When Fox Run ceased to pay Quinaquisset, Quinaquisset in turn fell into default on its own $950,000 note to Sentry. In April 1990 Fox Run and Sentry entered into a settlement agreement under which Sentry received title to Willowbend in return for its promise not to proceed under the $13 million note against two individuals who had guaranteed Fox Run's payments to Sentry. Sentry retained its mortgage on Willowbend, and in a subsequent foreclosure sale the property

was acquired by Evergreen Holding Company ("Evergreen"), a wholly owned subsidiary of Sentry.

In May 1990, Sentry, seeking to recover the balance of the $950,000 note from Quinaquisset, brought suit in state court against Quinaquisset's trustee and the individual guarantors of the note. In September 1990, Sentry itself failed. The RTC stepped in as its receiver, and removed Sentry's pending state court suit against Quinaquisset's trustee and the guarantors to federal district court.

In the district court, Quinaquisset asserted numerous claims of its own against the RTC as successor to Sentry, against Evergreen, and against Fox Run's trustees. It also asserted that the alleged misconduct of these entities

rendered the Quinaquisset-Sentry note null and void. Quinaquisset's claims against Evergreen were dismissed on a motion for summary judgment. On May 12, 1992, the district court entered separate judgment for Evergreen pursuant to Fed. R. Civ. P. 54(b), and we affirmed on appeal. Driscoll, 985 F.2d at 45.

Prior to its entry of judgment for Evergreen, the district court had on July 19, 1991, granted summary judgment for the RTC on its claims against Quinaquisset. The court found all but one of Quinaquisset's counterclaims to be barred by the D'Oench, Duhme doctrine, codified as 12 U.S.C. § 1823(e), which limits claims based on agreements or understandings not reflected in bank records. See D'Oench,

Duhme Co. v. FDIC, 315 U.S. 447 (1942). The remaining claim against the RTC was dismissed on other grounds and no appeal has been taken as to it. On November 13, 1992, the district court entered separate judgment for the RTC under Fed. R. Civ. P. 54(b). The judgment included an award of attorneys' fees and costs to RTC. This appeal followed.

In this court, Quinaquisset challenges the Rule 54(b) certification, but instead of offering a coherent explanation of why judgment for the RTC should have been delayed, Quinaquisset attacks the attorneys' fee award. The district court evidently entered a separate judgment for the RTC because all claims between Quinaquisset and the RTC had been resolved; the remaining claims by Quinaquisset against the Fox

Run trustees, in federal court solely on pendant jurisdiction, were remanded to the state court. We conclude that the judgment is properly before us.[1]

Turning to the merits, Quinaquisset contends that the district court's reliance on D'Oench, Duhme to dispose of its claims against the RTC as Sentry's receiver is mistaken. It says that its claims against the RTC are not based on any agreement, hidden or otherwise, between itself and Sentry, but rather on Sentry's foreclosure and sale of Willowbend. Quinaquisset argues that Sentry's settlement with Fox Run in April 1990, and its subsequent

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[1] The certificate may have been unnecessary. Because the district court added a paragraph to the judgment remanding the claims against the Fox Run trustees to state court, apparently the judgment disposed of all remaining claims in the federal court suit.

foreclosure on Fox Run's principal asset, Willowbend, destroyed the value of the $1.1 million Fox Run-Quinaquisset note deposited with the bank as collateral for Quinaquisset's own debt, and that this impairment of collateral in turn served to discharge Quinaquisset's debt to Sentry.

This legal theory represents a substantial winnowing of Quinaquisset's claims made in the district court. There, Quinaquisset alleged that Sentry engaged in wrongful conduct not only at the foreclosure stage but also earlier, e.g., with respect to Quinaquisset's October 1987 discharge of its mortgage on part of Willowbend and its reconveyance of condominium permit rights to Fox Run. Quinaquisset also made claims, likely foreclosed by

D'Oench Duhme, suggesting that Sentry had privately promised to assure that Fox Run would repay Quinaquisset the $1.1 million.

In fairness to the district court, it has often been difficult among the welter of claims to be sure what Quinaquisset was actually arguing at various points. Nor does the RTC help matters when it presses, as usual, a reading of D'Oench Duhme so broad that one is reminded of sovereign immunity claims made by independent nations. In any event, whether to avoid D'Oench Duhme or for some other reason, Quinaquisset has now reduced its legal position to a single claim (against the RTC) and defense (against the RTC's own suit) based on the impairment of the value of the $1.1 million note given to

Sentry as collateral for the Quinaquisset note.

This streamlined position may help Quinaquisset to avoid application of the D'Oench Duhme doctrine--although the RTC claims that the doctrine applies anyway--but the strategy raises its own problem: the lack of any legitimate theory of liability. The gist of what happened, in relation to the foreclosure, was that Sentry held the mortgage on Willowbend to secure the $13 million loan to Fox Run, Fox Run stopped paying, and Sentry then foreclosed the mortgage and applied the proceeds to the debt.[2] This left Quinaquisset's

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[2] As noted, Sentry also received a conveyance of title from Fox Run, and Sentry in exchange released two individuals who had guaranteed payment of the Fox Run-Sentry note. This conveyance was subject to the mortgage, but presumably assured that Fox Run

$950,000 note to Sentry still unpaid and the RTC proceeded with Sentry's prior suit to collect. These circumstances provide scant basis for a claim against Sentry or the RTC, or a defense against collection of the unpaid note.

Quinaquisset relies centrally on section 3-606 of the Massachusetts Commercial Code, Mass. Gen. L. ch. 106, § 3-606. That section, titled "Impairment of Resource or of Collateral," states in pertinent part:

> (1) The holder [of an instrument] discharges any party to the instrument to the extent that without such party's consent the holder
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> (a) without express reservation of rights releases or agrees not to sue any person against whom the party has to the knowledge of the holder a right of recourse or agrees to suspend the right to enforce against such

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would not challenge the foreclosure.

> person the instrument or collateral or otherwise discharges such person, except that failure or delay in effecting any required presentment, protest, or notice of dishonor with respect to any such person does not discharge any party as to whom presentment, protest, or notice of dishonor is effective or unnecessary; or
>
> (b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.

Although invoked by Quinaquisset, subsection (1)(a) does not by any stretch of the imagination apply in this case. With respect to the Quinaquisset-Sentry note--the subject of this suit--Sentry never purported to release anyone from, nor promised not to sue anyone under, this note. The only releases issued by Sentry had nothing to do with the Quinaquisset-Sentry note: they were releases of the individual guarantors of Fox Run's debt to Sentry, a debt for

which Quinaquisset was not responsible since it was never a party to nor a guarantor of the Fox Run-Sentry note.

Turning to subsection (1)(b), Quinaquisset argues that Sentry divested Fox Run of Willowbend by the transfer of title from Fox Run followed by the mortgage foreclosure. This in turn, says Quinaquisset, meant that Fox Run's principal asset was no longer available to Quinaquisset to back up Fox Run's debt to Quinaquisset. This is quite true, although somewhat misleading.[3] It might also be said that, in some sense, Sentry's actions "impaired" the "collateral for the instrument," if

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[3] It is misleading because Willowbend was not much of an asset, even in Fox Run's hands, so long as it was subject to a mortgage to secure a defaulted debt apparently as large or larger than the value of Willowbend.

collateral is taken to be the Fox Run-Quinaquisset note which Sentry held to secure the Quinaquisset-Sentry note and that latter note is called "the instrument."

But subsection (1)(b) requires that the impairment be "unjustifiabl[e]" and we think it absurd to argue, as Quinaquisset does without a shred of authority, that it was unjustifiable for Sentry to foreclose on property for which it held the mortgage when a default occurred on the secured debt. That is just what security is there for. The fact that this security was an asset of a party, Fox Run, who also had a debt to Quinaquisset meant that Quinaquisset was made worse off by the foreclosure. That is the normal fate of unsecured creditors when the bankrupt's only asset

is already pledged.

Quinaquisset might have been better off if Sentry had pursued Fox Run's Guarantors instead of looking to Willowbend to satisfy Fox Run's debt, but the guarantees were to Sentry and the mortgage ran to Sentry. Sentry's decision to forego its claims against the Fox Run guarantors in favor of a troublefree sale of the property was an entirely reasonable choice which was Sentry's to make. Sentry is not responsible for Quinaquisset's dilemma; if Quinaquisset's claim against Fox Run is illusory, it has no one but itself (and possibly Fox Run) to blame.

Since Quinaquisset has failed to set forth a cause of action or defense against Sentry under section 3-606 (and, thus, against the RTC as receiver), we

sustain the district court on that ground. See Doe v. Anrig, 728 F.2d 30, 32 (1st Cir. 1984) (court may affirm on a ground not relied on by the district court). We need not address the RTC's numerous other arguments as to why section 3-606 should not apply. Other versions of Quinaquisset's claims against Sentry made in the district court may properly have been dismissed on grounds of D'Oench Duhme, but since these versions have not been argued in this court, we have no occasion to consider them.[4]

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[4] Quinaquisset also complains that Sentry, and then the RTC, declined to surrender the Fox Run-Quinaquisset note after the foreclosure so that Quinaquisset could pursue its rights under the note. But (assuming the note still had value after the foreclosure), the note remained security for Quinaquisset's debt to Sentry; Sentry says, as one might expect, that the conditions for returning the note had

The final issue is the district court's award of attorneys' fees to the RTC. Under the terms of the guaranty supporting Quinaquisset's note to Sentry, the individual guarantors agreed not only to guarantee the Quinaquisset debt but to pay all costs and attorneys' fees incurred by Sentry "in connection with the enforcement of . . . [Sentry's] rights under, this guaranty." The district court awarded the RTC $79,374 in legal fees for the district court suit, and it held that the guarantors were jointly and severally liable for this amount.

Quinaquisset objects to the portion of the award attributable to the Evergreen phase of the litigation. It

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not been satisfied; and Quinaquisset offers no reply.

argues that the claims against Evergreen were not within the scope of the guaranty and the request for such fees is in any event untimely because it was made well after the separate judgment in favor of Evergreen. We consider the scope issue first. On the issue of interpretation of the guaranty, our review is plenary; neither side relies on anything other than the language of the guaranty, which extends to "all" costs and attorneys' fees of Sentry "in connection with" the enforcement of Sentry's rights under the guaranty.

Although this suit began with Sentry's efforts to collect against the Quinaquisset guarantors, Quinaquisset then asserted separate third-party claims against Evergreen. The only colorable claim against Evergreen was an

attempt to undo the foreclosure of Sentry's mortgage on Willowbend. Driscoll, 985 F.2d at 47. We agree that it might be too much of a stretch of the "in connection with" language to treat this phase of the litigation--if there were nothing more to Evergreen's involvement--as any part of the enforcement of Sentry's rights under the Quinaquisset-Sentry note.

But there was more to Evergreen's involvement. In the answer to Sentry's complaint Quinaquisset asserted that the conduct of Sentry's subsidiary of affiliate, i.e., Evergreen, was a defense to Sentry's suit against the guarantors on the Quinaquisset-Sentry note; and in the third-party complaint against Evergreen, Quinaquisset said that the conduct of various entities

including Evergreen made the note null and void. While this claim or defense as to Evergreen evaporated under scrutiny, the allegations made it essential for the RTC to defend Evergreen as part of Sentry's own collection suit against the guarantors.

As for timeliness, Quinaquisset's objection rests on a decision of this court, White v. New Hampshire Dep't of Employment Security, 629 F.2d 697 (1st Cir. 1980). There, this court held that a motion for attorneys' fees under 42 U.S.C. § 1988 came too late when made over four months after entry of a final judgment adopting a consent decree and apparently ending active litigation in the case. Quinaquisset fails to mention that the decision was reversed over a decade ago by the Supreme Court on the

very point at issue. 455 U.S. 445 (1982). In any event, there was no untimeliness here even under our original decision in White, so the objection is doubly without merit.

Attorneys' fees were not sought until after the separate judgment in favor of Evergreen but Evergreen itself had no claim to attorneys' fees. Rather, the guaranty ran in favor of Sentry, now the RTC as receiver. The RTC did seek attorneys' fees for all its work, including the defense of Evergreen's actions, before a final judgment was entered in its favor.

Lastly, we affirm the district court's decision that each guarantor is individually responsible for the full amount of attorneys' fees. Quinaquisset argues that the attorneys' fee should

have been apportioned among the guarantors, just as liability for the underlying debt was apportioned; the guaranty made each guarantor liable for $150,000 (or $75,000 in a few cases) of the underlying $950,000 debt, as provided in a schedule attached to the guarantee. The short answer is that liability for costs and attorneys' fees rests on a different provision of the guaranty that made the "Guarantors" liable for such costs and fees without limitation.

A promise cast in these terms normally makes each person liable for the full sum, whether the liability is described as joint, several, or both. 4 A. Corbin, Contracts § 928 (1951). Distinctions among those concepts (joint, several, joint and several)

relate to other matters, such as joinder and release, not to the amount of liability. The amount of liability can be contractually limited by specifying that the promisors are liable only for specific amounts, Corbin, supra, § 925, at 703-04, but in this case no such limitation was attached to the promise to pay collection costs and attorneys' fees.

The judgment of the district court is affirmed.

II.

MEMORANDUM AND ORDER

YOUNG, D.J. July 19, 1991

Resolution Trust Corporation ("Resolution"), as receiver and conservator for failed Sentry Savings Bank ("Sentry"), brings this action to

enforce a promissory note between Sentry and Quinaquisset Realty Trust ("Quinaquisset") and a guaranty agreement between Sentry and the individual defendants. Quinaquisset counterclaims and institutes a third party action for declaratory judgment.

Upon the hearing of Resolution's motion for summary judgment held June 26, 1991,[1] counsel for Quinaquisset for the first time interposed a defense

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[1] At a previous motion hearing, held May 14, 1991 in Worcester, this Court DENIED Quinaquisset's Motion for Lis Pendens (Tr. at 40); DENIED Resolution's Motion to Dismiss for failure to plead fraud with particularity (Count 9 of Counterclaim) (Tr. at 41); and GRANTED Partial Summary Judgment to Resolution Trust, as receiver, on Count II of the Counterclaim, seeking rescission of the first mortgage. (Tr. at 22, 25).

based on the Uniform Commercial Code.[2] The matter was taken under advisement, though the Court candidly acknowledged from the bench that the principal of D'Oench, Duhme & Co., Inc. v. Federal Deposit Insurance Corporation, 315 U.S. 447 (1942),[3] very likely eradicated all

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[2] Quinaquisset asserts that the Mass. Gen. Laws ch. 106, § 3-606 discharges its obligation on the Note due to impairment of collateral resulting from Sentry's alleged bad faith actions on the Fox Run Note. This court can find no other reference to U.C.C. violations in the pleadings, papers, or documents presented.

[3] "The so-called D'Oench doctrine provides that, following FDIC assistance to a failing [banking] institution, no party may sue or defend against the FDIC relying on an agreement that does not appear in bank records" S. Weiss & K. Kraus, "D'Oench Protection for Private Institutions Assisting the FDIC: A Necessary Component of the Thrift and Bank Bailout," 106 Banking L.J. 256 (1991).

Quinaquisset's defenses and its counterclaim.[4]

Quinaquisset invokes the U.C.C. as a defense against actions performed by Sentry, not by the FDIC. Federal common law does not allow personal defenses against the FDIC for actions by a failed bank, unless the FDIC is the actor complained of or is not a holder in due course. See Federal Deposit Insurance Corporation v. Blue Rock Shopping Center, 766 F.2d 744, 751-53 (3rd Cir.

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[4] Quinaquisset's third-party action against Evergreen Holding Company, the current owners of Willowbend, alleging Misrepresentation and Breach of Contract (count II); constructive trust (count III), breach of implied contract (count V); and unfair and deceptive trade practices (count XII) appears unaffected by the outcome of this summary judgment motion. Evergreen's Motion to Dismiss is pending before this Court.

1985); see Federal Deposit Insurance Corporation v. Wood, 758 F.2d 156, 159 (6th Cir. 1985), cert. denied, 474 U.S. 944 (1985) (espousing holder doctrine); Campbell Leasing, Inc. v. FDIC, 901 F.2d 1244, 1248 (5th Cir. 1990).[5] Quinaquisset asserts only personal defenses regarding the underlying transaction with Sentry. This avails it nothing. See Campbell, 901 F.2d at 1249. Summary judgment is GRANTED to Resolution Trust on its underlying action and the counterclaim is

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[5] Blue Rock Shopping Center, supra, upon which Quinaquisset relies, is inapposite since there it was the actions of the FDIC, rather than the failed bank, which were questioned by the defendant. Id. at 753.

dismissed,[6] all pursuant to the reasoning expressed in D'Oench Duhme.[7]

SO ORDERED.

WILLIAM G. YOUNG

UNITED STATES DISTRICT JUDGE

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[6] The counterclaim, the antithesis of the complaint, suffers a similar demise based on D'Oench Duhme.

[7] Quinaquisset asserts that the D'Oench Duhme doctrine supports Resolution Trust only as receiver and not as conservator. Congress, however, uses the terms "conservator" and "receiver" interchangeably. Indeed, Congress defines "receiver" to include "receiver, liquidating agent, conservator, commission, person, or other agency charged by law with the duty of winding up the affairs of a bank or savings association or of a branch of a foreign bank." 12 U.S.C. § 1813(j). This Court concludes that, insofar as Resolution Trust performs the duty of protecting its assets, whether as conservator, receiver, or corporate entity, the protection of D'Oench Duhme attaches.